THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No. 2401-0123-04-A-09
BRENDA FOGLE	)	
Employee	)	Date of Issuance: March 21, 2011
	)	
v.	)	Rohulamin Quander, Esq.
	)	Senior Administrative Judge
D.C. PUBLIC SCHOOLS	)	
Agency	)	
	)	

Omar Vincent Melehy, Esq., Employee Representative
Harriet E. Segar, Esq., and Bobbie Hoye, Esq., Agency Representatives

INITIAL DECISION
(Awarding of Attorneys Fees and Costs)

INTRODUCTION AND PROCEDURAL BACKGROUND

Brenda Fogle ("Employee" or "Fogle") was a Physical Education Teacher, ET-15, at the Alice Deal Junior High School, a public school in the District of Columbia (the "Agency"). Employee was hired in 1988, and had acquired Career Status by the time that she was removed from that position via a reduction in force (RIF), effective on June 30, 2004. Employee filed a timely appeal with the Office of Employee Appeals ("the Office" or "OEA"), challenging the legality of Agency's actions, focusing upon the process by which she was terminated. By Initial Decision (the "ID") issued on March 14, 2006, Sheryl Sears, Esq., an Administrative Judge (the "AJ") formerly employed by this Office, ruled in favor of the Agency, the effect of which dismissed Employee's appeal.

Employee appealed the dismissal of her case to the Superior Court of the District of Columbia, and upon review of the appeal, on May 17, 2007, Associate Judge Judith E. Retchin issued an order reversing AJ Sears' ID, remanding the matter to OEA for further proceedings. While the Court affirmed that the jurisdiction of this Office in Employee's appeal is limited to the questions of whether Employee received "written notice of at least

30 days before the effective date of . . . her separation" and "whether [Employee] received one round of lateral competition per the statute," the Court concluded that AJ Sears erred in finding that Employee received adequate notice of the removal, when "the record was ambiguous on this point."[1] The Court also found that the AJ erred in granting summary judgment against Employee on the question of whether she was provided a round of lateral competition in accordance with the statute, "when there was a factual dispute that needed to be resolved."

In her complaint Employee contended that Agency did not actually abolish her position, and within months of the date that she was removed, Agency hired a "Dance Teacher" who assumed all of Employee's prior duties as a Physical Education Teacher. However, the new hiree, despite the change in job title, provided no dance instruction. Pursuant to the Court's directive, an evidentiary hearing was initially scheduled by AJ Sears for October 24, 2008, to address the sole question, "Whether Agency abolished one Physical Education Teacher, ET-15 position at Alice Deal Junior High School." The parties were notified that, if the AJ found as a fact, that Employee's position was abolished, another evidentiary hearing would be conducted on the question of whether, in determining which employees to separate, Agency properly conducted staff evaluations in accordance with the guidelines set forth by the Competitive Level Documentation Form (CLDF), to determine which employee(s) should be terminated.

Prior to the evidentiary hearing, the parties entered into independent settlement negotiations. On October 21, 2008, Employee requested, as a condition to agreeing to a joint motion to cancel the evidentiary hearing, that Agency agree to and submit a "Statement of Admission." Agency agreed, indicating further that it did not intend to present any witnesses at the hearing. Agency further stated, "The Agency hereby admits that it does not contest the above-referenced matter." The parties continued negotiations, attempting to work out the details of what would hopefully become a settlement.

On November 24, 2008, Employee filed a "Motion for Judgment on the Issue of Liability and the Right to Reinstatement, Lost Pay and Benefits." The motion stated that Agency "conceded that it terminated the Employee's employment with the Agency unlawfully and she is entitled to reinstatement with full back pay and benefits."[2] Agency responded to the motion on December 11, 2008, stating that, while it "does not dispute the conclusion that Employee would be entitled to reinstatement and other benefits consistent with a finding from the Office of Employee Appeals reversing the reduction in force," Agency "does not admit, nor has it ever admitted that the Agency acted in an unlawful manner, as stated in the Employee's motion."[3]

The effect of Agency's responsive statement, while not fully embracing all of the language that Employee's proposed settlement document sought to incorporate, underscored that Agency conceded that, in the process of terminating Employee, it committed an error, the reversal of which entitled Employee to reinstatement and other

[1] See Judge Retchin's Order, attached at Employee's Exhibit "A".
[2] See Employee's Motion, P. 2.
[3] See Agency's Reply Statement, P. 1.

benefits consistent with a finding of liability. On December 29, 2008, AJ Sears issued her Initial Decision (the "ID"), stating, "By virtue of Agency's admission, there are no material and genuine issue of fact on the question of whether Agency abolished Employee's position of Physical Education Teacher. As there was no lawful basis upon which to conduct a reduction in force at all, this Judge must find that Employee was unlawfully removed." Employee was then ordered to be reinstated to her last position of record, with reimbursement for back pay and benefits lost as a result of her removal from her position. That decision became final on February 2, 2009, as neither Employee nor the Agency appealed the AJ's ruling.

Prevailing Party, Agency's Response and Objections

Employee's Motion for Attorney Fees and Costs recited several elements that this AJ must evaluate and decide before an award of reasonable attorney fees and costs can be decided. The first prerequisite and consideration is that OEA must award attorney's fees and costs if Employee is (a) the prevailing party, and (b) payment is warranted in the interest of justice. See *D.C. Code Ann.,* § 1-606.8; OEA Rule 638.1; *Chun v. Department of Public Works,* OEA Matter No. 2401-0079-94AF95 (September 30, 1996). For an employee to be considered the prevailing party, she must obtain all or a significant part of the relief sought. *Zervas v. District of Columbia Office of Personnel,* OEA Matter No. 1602-0138-88AF92 (May 14, 1993). An employee who is ordered reinstated to a position within the agency, even if it is not the employee's original position of record, is considered the prevailing party. *Chun v. Department of Public Works, supra.* (Employee was reinstated to a position at the Agency, albeit not his original position of record, and Employee received back pay and benefits.

As the deciding AJ, I find that Employee was successful in contesting her removal and obtained all of the relief sought – reinstatement to a teaching position similar to the one she left with back pay and benefits. The order became final on February 2, 2009. Therefore, I find that Employee is the prevailing party.

Although Agency did not dispute that Employee was the prevailing party, and that an award of a reasonable attorney's fee and costs was warranted,[4] Agency raised several objections to the fee petition, including:

1. The requested hourly rate sought, based upon the *Laffey Matrix*, ("*Laffey" or the* "Matrix") was unreasonable and excessive by any standard;
2. The applicability of the *Laffey* Matrix for fee petitions for proceedings conducted before administrative agencies;
3. Establishing the proper standard for the application of *Laffey;*
4. Employee is seeking compensation for legal work performed in other forums;
5. Employee is seeking compensation for legal services provided by persons who were not members of the D.C. bar; and

[4] See the *Official D.C. Code* § 1-606.08 (2001 ed.), and OEA Rule 638.1.

6. OEA should not award travel time as a component in granting the attorney fees request.

The essence of Agency's argument was that the hourly rate claimed, based upon the Matrix is misplaced, as the matrix should be reserved for use and application in complex federal litigation, not applicable in this fee petition forum. Agency also challenged the amount recited in the fee request, noting that a number of the attorneys referenced were not members of the District of Columbia Bar, and therefore, their services are not compensable.

In The Interest of Justice

A second prerequisite for the awarding of attorney's fees is that it be allowed in the interest of justice. See *D.C. Code Ann*. §1-606.8; OEA Rule 638.1; *Chun v. Department of Public Works, supra*. In determining whether an award is in the interest of justice, OEA has recognized *Allen v. United States Postal Service*, 2 M.S.P.R. 420 (1980) (the "Allen Factors") as persuasive authority. An award of attorney's fees is in the interest of justice when at least one of the following five factors is present:

1. The agency engaged in a prohibited personnel practice;
2. The agency's action is clearly without merit, wholly unfounded or the employee is substantially innocent of the charges brought by the agency;
3. The agency initiated the action against the employee in bad faith;
4. The agency committed gross procedural error which prolonged the proceeding or severely prejudiced the employee; or
5. The agency knew or should have known it would not prevail on the merits when it brought the proceeding. *Id.* at 434-35.

Employee asserts that Agency violated at least *Allen* Factor #1, having engaged in a prohibited personnel practice. If an Agency terminates an employee through a RIF, the Agency must actually abolish the employee's position for legitimate reasons, and must offer the employee one round of lateral competition. In this case, Agency has conceded that it abolished Employee's position improperly in violation of its own rules and regulations – a prohibited personnel practice - either because the position was not actually abolished or because Employee was not given one round of lateral competition or both. I find that Employee has satisfied the first *Allen* Factor and is entitled to an award of reasonable attorney's fees and costs.

Alternatively, I find that there is a strong indication that several additional *Allen* Factors were seemingly present. Factor # 4 - the Agency committed gross procedural error when it removed Employee without cause, without actually abolishing the position and without offering her one correctly administered round of lateral competition. Factor # 5 - the Agency knew or should have known that, with the Employee electing to pursue an appeal which would uncover and expose Agency's improper actions incidental to the RIF, Agency would not prevail on the merits because it knew that it never abolished Employee's position. Finally, Factor # 3 – Agency, knowing that in reality it had neither abolished Employee's position, nor given her the mandated one round of lateral

competition, elected to proceed nonetheless, hoping not to be discovered. This pattern of conduct was an exercise in bad faith, which pattern of self servicing, indulgent behavior Agency was fully aware of at all times.

I find that had Agency made a reasonable attempt to admit their error at an earlier stage in its proceeding and process, Agency would have spared all parties in time, money, and frustration. Instead, Agency inordinately dragged out this matter over an extended period of several years, knowing that a serious error had been committed and before ultimately conceding to Employee's reasonable demands. I find that it was Agency's recalcitrance which drove up the amount of legal services, and likewise the level of reasonable and justifiable attorney's fee award necessitated by counsel's tenacious, but consistent follow through on Employee's behalf. I conclude, therefore, than an award of a reasonable attorney fee is in the interest of justice.

REASONABLENESS OF THE ATTORNEY'S FEES, REASONABLE RATES

The Laffey Matrix and Current Laffey Rates

Employee underscored that for the last several years, OEA has incorporated *Laffey* and its guidelines, as a benchmark to determine what hourly rate is appropriate to award, and whether the petitioning attorney's hourly rate is reasonable. See *Tatum v. D.C. Public School.,* OEA Matter No. 2410-0013-03 (June 6, 2003). Employee asserts that his professional experience in this subject area justifies the hourly rates that he is seeking. Further, he maintains that because he is seeking rates consistent with the Matrix, they should be deemed reasonable.[5]

Agency took multiple-step exception to counsel's request, asserting that Employee's counsel's legal work on her behalf was mundane, and not a pursuit which demonstrated the level of complex litigation that the utilization and application of the Matrix anticipated. First, Agency observed that, despite the OEA Board history of permitting the use of the Matrix in some fee petition cases, the use of the matrix is still discretionary, and the applicability should depend upon the facts of each case.

Agency underscored that *Laffey* was developed by the U.S. Attorney's Office for the District of Columbia to track prevailing attorneys' hourly rates for complex federal litigation. As such, it "creates an axis for a lawyer's years of experience in complicated federal litigation and a second [axis] for rates of compensation." See *Griffin v. Washington Convention Center*, 172 F. Supp 2d 193, 197 (D.C.C. 2001) (emphasis added). Agency also relied upon the prior ruling in *Covington v. District o Columbia*, 57 F.3d 1101, 1103 (D.C. Cir 1995), which held that attorneys "have to state their federal court experience in order to get *Laffey* rates." Agency concluded by asserting that Employee's counsel's legal services were a series of mundane actions, i.e., ordinary legal services, which do not reflect the rendering of professional services that qualify for awarding attorney fees at the established *Laffey* level of compensation.

[5]See Melehy Affidavit ¶ 19, attached as Exhibit "A"; *Laffey* Matrix, attached as Exhibit "B".

In response, Employee asserted that over a period of time that covered at least three years, counsel handled the following tasks: investigated the case, researched the applicable law, conducted discovery, filed discovery motions, conducted settlement negotiations, prepared briefs to OEA, prepared for a hearing on the case, spoke to the client about the case status and the facts of the case, and drafted a Motion For Attorney's Fees and Costs. All of the above-referred legal services are traditionally provided by counsel in cases of this type, which OEA has long recognized as appropriate for the application of the *Laffey* fee structure in awarding attorney fees to prevailing parties.[6]

As an additional component, Employee asked the AJ to also consider, when calculating the warranted fees and costs, that Employee and her legal counsel, despite their having ultimately prevailed, were unreasonably and long delayed in the awarding of this fee request. With the sustained delay in payment, the Lodestar figure may properly be calculated based upon current market rates *(emphasis added)*, rather than the lower rate that was in place at the time that the actual legal service was rendered. *Murray v. Weinberger*, 741 F.2d 1423, 1433 (D.C. Cir 1984); *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989). Indeed, "[c]urrent market rates have been used in numerous cases to calculate the lodestar figure when the legal services were provided over a multiple-year period and when use of the current rates does not result in a windfall for the attorneys." *Murray*, 741 F.2d at 1433, citing *Environmental Defense Fund v. Environmental Protection Agency*, 672 F.2d 42, 58 & n.11 (D.C. Cir. 1982). *In re Ampicillan Antitrust Litigation*, 81 F.R.D. 395, 402 (D.D.C. 1978). *See also*, *Shepherd v. American Broadcasting Companies*, 82 F. Supp. 505, 509 (D.D.C 1994) *vacated on other grounds*, 62 F.3d 1469 (D.C. Cir. 1995); *Covington*, 839 F.Supp. at 902. The record reflects that this case has spanned more than four years, with counsel involved for more than three and one half years, including with a fee petition pending before OEA from February 16, 2009. Yet, Agency has not paid any attorney's fees or costs to date.

The District of Columbia Court of Appeals (the "DCCA") consistently uses current *Laffey* rates to compensate lawyers for the delay in payment when the case has spanned several years. *See Lively v. Flexible*, 930 A.2d 984, 989-90 (D.C. 2007)("Indeed, the adjustment for inflation by the use of current hourly rates, rather than the historic rates of the relevant legal community, has been recognized as a means of 'approximat[ing] the value today of the historic rates charged at the time when the legal services actually were rendered' .")

The rationale for this option is explained more fully by the United States Court of Appeals for the D.C. Circuit, which held that an award of current rates is commonplace, regardless of the inflation rate or passage of time. *See Brown v. Pro Football, Inc*., 846 F. Supp. 108, 117 (D.D.C. 1994) (awarding current market rates to account for three-year delay), *rev'd on other grounds*, 50 F.3d 1041 (D.C. Cir. 1995). Employee noted that courts often adjust upward attorney fees incurred, since "[p]ayment today for services rendered long in the past deprives the eventual recipient of the value of the use of the

[6] See Employee's Motion For Attorney's Fees and Costs at P. 9.

money in the meantime, [an] adjustment to reflect the delay in receipt of payment therefore may be appropriate." *Copeland v. Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980) (*en banc*). See also *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air,* 483 U.S. 711, 716 (1987).

Applicability of the Laffey Matrix to Administrative Proceedings

Agency challenged the applicability of the *Laffey* fee schedule to award attorney fees for legal services rendered in proceedings conducted before administrative agencies. Agency cited the court's holding in *Hashima Agapito, et al., v. District of Columbia*, 525 F. Supp. 2d 150 (D.D.C. 2007) *(Agapito).* In that administrative proceeding, conducted pursuant to 20 U.S.C. § 1400 *et seq.*, the court ruled that attorneys who appeared before the court under the *Individuals with Disabilities Education Act of 2004* ("IDEA") proceedings, could not petition for attorney fees relying upon the *Laffey* procedure as the method to determine the awarding of attorney fees, because the work performed was not "complex federal litigation."

I take notice that the court's ruling in *Agapito* has not been followed by other judges, who have determined just the opposite, allowing petitioners who are the prevailing party, the use of the *Laffey* Matrix format for determining the reasonableness of the attorney fees. In *Johnice Jackson v. District of Columbia*, C.A No. 07-0138 (U.S.D.C.) ("Jackson"), issued March 19, 2010, the court pointedly rejected the denial of the Matrix as applied in *Agapito,* noting that while two judges have adhered to the supposedly "complex federal litigation" standard, as the threshold requirement before allowing the Matrix's fee guideline to govern the award, most judges in this district have rejected such a narrow interpretation, and routinely allowed the Matrix in administrative proceedings, provided the rates were reasonable.[7] Holding that if the petitioner is the "prevailing party" and provided the fee request is "reasonable," the *Jackson* court adopted the Matrix and its compliance elements, as an appropriate method for determining the legal services compensation. Indeed, as *Jackson* points out, Agency's argument that the IDEA [administrative agency level] litigation was not sufficiently complex so as to warrant application of the *Laffey* rates, has been squarely rejected by at least one judge in this district.[8] Judge Urbina summed up his ruling to allow the use of *Laffey* by holding that the rates are applicable without further controversy in connection with district court litigation resulting from IDEA administrative proceedings, and that the court identified no persuasive justification for applying a lower billing rate for the administrative proceedings underlying such litigation.[9]

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[7] See *Jackson*, P. 6 in holding, citing *Kaseman v. District of Columbia*, 329 F. Supp. 2d 20, 25-26 (D.D.C. 2004) (relying on the *Laffey* Matrix to determine the reasonableness of rates charged for legal services rendered in connection with IDEA administrative proceedings.

[8] See, *In Re Nesbit* , Civil Action No. 01- 2429 (D.D.C. Nov. 4, 2003)(Order) at 1, rejecting the Defendant's contention that the Plaintiffs should not receive the rate contained in the *Laffey* Matrix because IDEA litigation is not equivalent to complex federal civil rights litigation, because the court perceived no reason to create an exception to the use of the *Laffey* Matrix.

[9] *Ibid.* at p 9, citing *District of Columbia v. Jeppsen*, 2010, WL 638339, at *2 (D.D.C. Feb. 24, 2010) (applying the *Laffey* Matrix for fees incurred in connection with a declaratory judgment action challenging the results of an IDEA administrative proceeding.)

The Skill and Experience of Counsel Warrants Laffey Matrix Rates

Employee's counsel asserts that he has the skill and experience that more than justifies an award at *Laffey* rates. He recited the number of trials in which he served as lead counsel, the approximate number of trials decided by juries, the number of trials decided by a judge without a jury, and the number of employment-related administrative hearings in which he served as lead counsel. The aforementioned proceedings were conducted before various federal, state, and municipal forums, several of which resulted in published legal opinions.

In making a comparison of his legal credentials and professional experience, Employee's lead counsel (Melehy) rated his own reputation as a skilled litigator, trial lawyer and Plaintiff's employment lawyer. He characterized the legal services rendered to Employee, as "high quality representation that he demonstrated during the present litigation and consistent with his vast experience."[10] Counsel has achieved an "AV" rating – the highest rating available – from Martindale-Hubbell, which rating is directly related to his reputation as a highly skilled litigator. Attorneys and judges provide the reviews that form the basis of the AV rating. *Id*. Counsel attached to his fee petition a Declaration provided by Kate Fulton, Esq., a former associate, who worked closely with him on a daily basis. She observed that, "Mr. Melehy was a very skilled, knowledgeable and an experienced litigator . . . he is held in high regard amongst the employment bar in the Washington, D.C. metro area."[11]

The fee petition also requests compensation for four primary associates who performed lesser tasks on the case during the various stages of litigation, all of whom are represented to posses some legal skill and experience in the subject area, and each of whom had prior working experience before becoming associated with counsel's law firm. The named individuals are: Charles Henderson, Kate Fulton, Shelly Borchert and Lawrence Rudden.[12] All of them were first or second year associates. *Laffey* compensation is sought for them at the lowest hourly rate, i.e., $225.00 per hour.[13] Additionally, Stephanie Casey, a law clerk, performed largely ministerial tasks. Her *Laffey* Matrix billing rate was the law clerk rate of $130.00 per hour.

Employee requests a fee award based upon current *Laffey* Matrix rates as required in *Lively v. Flexible Packaging, supra,* 930 A.2d at 989-90. The current Laffey Matrix rates for attorneys and staff who worked on the Fogle case – given their experience levels at the time the work was done – was calculated as follows:

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[10] See Employee's *Motion And Memorandum In Support OF Employee's Motion Fro Award Of Attorney's Fees And Costs*, P4.

[11] See Declaration of Kate Fulton ¶9, attached as Exhibit "C".

[12] Lawrence Rudden's professional status changed from law clerk to attorney while these proceeding were ongoing. Therefore, he is listed at $130.00 per hour for law clerk services, and subsequently listed at $225.00 per hour for attorney work. It is presumed by this AJ that Mr. Rudden was sworn into the bar while this matter was ongoing.

[13] See Melehy Declaration ¶¶ 18-27; *Laffey* Matrix.

a. Omar Vincent Melehy: $465/hour x $65.60 hours = $30,597.00, work done after June 1, 2005 (20 Years Exp.)
b. Lawrence Rudden (Attorney): $225/hour x 59.60 = $13,410.00
c. Charles Henderson: $225/hour x .50 = $112.50
d. Shelly Borchert: $225/hour x .20 = $45.00
e. Regan Rush $270/hour x 49.40 = $13,338.00
f. Law Clerk: $130/hour x 4.8 hours = $624.00

TOTAL ATTORNEY FEE SOUGHT: *$58,126.50*

g. Incurred costs $1,688.09

I find that the Laffey Matrix can be applies by OEA for determination of attorney fee awards in administrative proceedings. This finding is consistent with the established policy of the OEA Board, and discounts the ruling of another OEA judge *In the Matter of April Washington v. D.C. Public Schools*, OEA Matter No. 1601-0021-08A10, upon which Agency places its reliance in the recently filed *Agency's Response to Employee's Summary of Employee's Attorney Fees Incurred at OEA.* I further find that it is likewise appropriate to award attorney fees at the current, verses the historic rate.

REASONABLENESS OF TIME EXPENDED

Legal Principals

In computing the hours expended in this litigation, Employee's counsel provided as reference the contemporaneous time spent and expense records, and made a good faith effort to exclude excessive hours or unnecessary time claims. In *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982) (Tamm, J., concurring), the Court stated that a properly prepared petition for attorneys' fees must provide detailed summaries of work performed and time spent by each attorney based upon contemporaneous time records so that the court can make a reasonably accurate assessment of the hours expended. While detail is required, "[i]t is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney." *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980). Thereafter, the court has discretion and may assess the justification for the hours claimed. *Concerned Veterans*, 675 F.2d at 1327.

The Time Expended In This Case And The Reasons Why It Was Reasonable.

Counsel attached to his fee petition, as Exhibit "E," an Excel Spread Sheet, which: 1) identified the various attorneys and support staff who rendered the service; 2) noted each time entry for which compensation is sought; 3) stated the historical and current Laffey rates for the attorney or non-attorney performing the work related to the time entry; and, 4) enumerated the time spent on the particular entry as well as the cost of the time spent on that entry. Reflected in the enumeration of legal services provided were: 1) counsel's investigation of the case; 2) researching the applicable law; 3) conducting discovery; 4) filing discovery motions; 5) conducting settlement negotiations;

6) preparing briefs for filing at OEA;[14] 7) preparing for an evidentiary hearing on the case; 8) conducting several discussions, both in person and by telephone, with Employee (the client) about the case status and developing the facts of the case; and 9) drafting a Motion for Attorney's Fees and Costs.

Seeking compensation for legal work performed in other forums

Agency asserts that OEA may not award fees for work done in other forums, noting that Employee's counsel has requested an award of attorney fees for drafting a Petition for Appeal to Superior Court, an Appellate Brief to Superior Court, and a Reply Appellate Brief to Superior Court. (See Employee's Motion For Attorney's Fees and Costs at Pp. 11-13) For these services, Employee's counsel had requested a total of $19,255.00 at current *Laffey* rates or $17,595.50 at historical *Laffey* rates. Agency objected, noting that counsel should *not* be awarded any of the requested fees for work done in another forum.

In *Gurley v. D.C. Public Schools*, OEA Matter No. 1601-0008-05A08, *Opinion and Order* issued June 25, 2008, the OEA noted that attorney's fees could be awarded for work completed before the OEA and at the Agency level, but no award for work done elsewhere. *See Jenkins v. D.C. Public Schools*, OEA Matter No. J-0050-91AF92, *Opinion and Order* issued March 18, 1994, __ *D.C. Reg.* __ (absent any statutory provision expressly granting such authority, OEA has no jurisdiction over the granting of attorney fees for work done before any court or tribunal).

There is no successful argument to be made that the work performed on the Petition for Appeal to Superior Court, Appellate Brief, and Reply Appellate Brief before the Superior Court was work before OEA. Consequently, there can be no award of attorney's fees for any of the work before the Superior Court. Therefore, Employee's request for an award of attorney's fees must be reduced by either $19,255.00, current *Laffey* rate, or $17,595.50 (historical Laffey rate).

On July 23, 2009, Employee's counsel filed Employee's *Second Supplemental Memorandum In Support Of Employee's Motion For Award Of Attorney Fees And Costs* (the "Second Memorandum."), seeking $57,580.05 in attorney fees. He elected to withdraw a portion of the attorney fees sought incidental to appellate proceedings at the Superior Court, advising OEA that on July 22, 2009, one day prior to the filing of the Second Memorandum, Judge Retchin, Superior Court, D.C., entered an Order awarding Employee approximately $19,190.00 in fees related solely to the Superior Court appeal.[15] Therefore, the only issue that remains for resolution by OEA is the reduced amount of attorney's fees related solely to OEA's proceedings. The effect of Judge Retchin's attorney fee award reduces the OEA-based total of fee request to approximately $38,390.05 for the OEA proceedings, plus $723.74 in costs as outlined in the Employee's

[14] As noted above, legal service time expended incidental to work performed before the Superior Court, another forum, was stricken from this fee petition, with Judge Retchin, Superior Court, making a direct attorney fee award of $19,190.00.
[15] *See* Order, attached as Exhibit "A".

Supplemental Memorandum dated April 21, 2009. However, Employee advised OEA that during the long-term commitment and efforts required incidental to gaining enforcement of OEA's order, she incurred substantial additional fees on the OEA level.[16]

The total now sought in attorney's fees is $58,126.50 (the $38,390.05, balance left after Judge Retchin awarded $19,190.00 in attorney fees at the Superior Court level, plus $19,736.45 now sought at historical *Laffey* rates), plus outstanding costs of $1,688.09. The total requested in attorney fees and costs is $59,814.59.

Seeking Compensation For Legal Services Provided By Persons Who Were Not Members of the D.C. bar

Citing Rule 49(a) of the District of Columbia Court of Appeals, Agency argues that OEA may not award fees for work by attorneys who are not members of the D.C. Bar. The Rule states:

> No person shall engage in the practice of law in the District of Columbia or in any manner hold out as authorized or competent to practice law in the District of Columbia unless enrolled as an active member of the District of Columbia Bar, except as otherwise permitted by these Rules. D.C. Ct. App. Rule 49(a).

Agency noted that while Omar Melehy, lead counsel, is a member in good standing of the D.C. Bar, all four of the listed associated attorneys who worked on this case - Kate Fulton, Charles Henderson, Lawrence Rudden, and Shelly Borchert – were, at all times relevant to this request for attorney fees, members of the Maryland Bar. There is no indication that any of them were members of the D.C. Bar during any of the extended time that it took this matter to come to its final resolution. Agency also cited the above referred affiants' respective affidavits attached to Employee's Motion and Memorandum, to support the conclusion that none of these attorneys were licensed to practice law in the District of Columbia.

Agency concluded its argument that, based upon the legal services provided as enumerated in the professional services billing reports, Fulton, Henderson, Rudden, and Borchert all engaged in the impermissible practice of law, as defined under Rule 49, and as a consequence of not being members of the District of Columbia Bar, there should be no award at an attorney fee rate for any work which they completed.[17]

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[16] See Employee's *Second Supplemental Memorandum In Support Of Employee's Motion For Award Of Attorney's Fees And Costs*, P. 1, (July 23, 2009), and Employee's *Third Supplemental Memorandum In Support Of Employee's Motion For Award Of Attorney's Fees And Costs*, P. 3-5, and the Spreadsheet of Supplemental Time Entries, attached as Exhibit "D," (September 10, 2009).

[17] D.C. Ct. App. Rule 49(a) states that "no person shall engage in the practice of law in the District of Columbia or in any manner hold out as authorized or competent to practice law in the District of Columbia…" unless an active member of the District of Columbia bar. Thus, in order to be engaged in the unauthorized practice of law, one must 1) practice law; and 2) practice law in the District of Columbia or hold out as authorized to practice in the District. The Rule defines "in the District of Columbia" to include "conduct in, or conduct from an office or location within, the District of Columbia". D.C. Ct. App. Rule

Employee replied, noting that D.C. Ct. App. Rule 49(a) states that "no person shall engage in the practice of law in the District of Columbia or in any manner hold out as authorized or competent to practice law in the District of Columbia…" unless an active member of the District of Columbia bar. Thus, in order to be engaged in the unauthorized practice of law, one must: 1) practice law; and 2) practice law in the District of Columbia or hold out as authorized to practice in the District.

Employee argued further that the Rule defines "in the District of Columbia" to include "conduct in, or conduct from an office or location within, the District of Columbia". D.C. Ct. App. Rule 49(b)(3). The committee notes to this rule make it abundantly clear that the rule against practicing law in the District of Columbia only applies to the practice of law "within the boundaries of the District of Columbia". *Id*. Further, "even if a matter involves a client, and a dispute or transaction, in the District, the Rule does not apply if a lawyer located outside the District advises a client in-person only when the client visits the lawyer in the lawyer's office, or if the lawyer advises the client only by telephone, regular mail or electronic mail." *Id.* The Committee notes makes clear that once the lawyer enters the District of Columbia boundaries related to a particular case, then he or she falls under the purview of the rule prohibiting unauthorized practice of law in the District.

Employee insisted that because Rule 49 is fundamentally a consumer protection rule, it is of central importance that Employee was aware that the four associates were only licensed in Maryland. Further, Employee asserts that she was never under the belief that Borchert, Fulton or Rudden were District of Columbia lawyers, and she never had any contact with Henderson.[18] She was also never under the misconception that any of the lawyers from the firm Melehy & Associates were located within the District of Columbia as she always met with the attorneys at their only office, located in Silver Spring, Maryland. Employee was fully aware that Omar Vincent Melehy, as lead counsel on the case, was licensed to practice in the District.[19] However, because the billing rates for the associates were lower, Ms. Fogle approved of the associates' work on the case because it saved her money.[20] Finally, the firm has always made it clear on its letterhead that only certain attorneys are licensed in the District of Columbia.[21]

49(b)(3). The committee notes to this rule make it abundantly clear that the rule against practicing law in the District of Columbia only applies to the practice of law "within the boundaries of the District of Columbia". *Id*. Further, "even if a matter involves a client, and a dispute or transaction, in the District, the Rule does not apply if a lawyer located outside the District advises a client in-person only when the client visits the lawyer in the lawyer's office, or if the lawyer advises the client only by telephone, regular mail or electronic mail." *Id.* The Committee notes makes clear that once the lawyer enters the District of Columbia boundaries related to a particular case, then he or she falls under the purview of the rule prohibiting unauthorized practice of law in the District.

[18] See Declaration of Brenda Fogle, attached as Exhibit "B" at ¶¶3-4 and 6. Further, Henderson only billed .5 hours to this case on May 24, 2005 for research, worth $92.50. *See* billing entries attached to Employee's Motion for Attorney's Fees as Exhibit "E".

[19] *Id.* at ¶7.

[20] . *Id.* at ¶8.

[21] See Melehy Declaration at ¶5.

I find that the four Maryland lawyers in question did not engage in the unauthorized practice of law in the District of Columbia, as none of them practiced law within the geographical boundaries of the District of Columbia or held themselves out as competent or authorized to practice law in the District of Columbia. I conclude that the time they spent on this case is compensable.

Seeking Award For Travel Time

Employee's counsel has requested an award of attorney fees for time spent traveling to and from pre-hearing conferences. (See Employee's Motion For Attorney's Fees and Costs at pg. 15) The following entries were made related to travel:

Date	**Attorney**	***Laffey* Current Rate[22]**	***Laffey* Historical Rate**
Sep. 6, 2008	Melehy	$465	$425
Nov. 26, 2007	Melehy	$465	$440

In response, Agency requests that no attorney fees for travel time should be awarded, as Employee's counsel has not presented any evidence that any work was performed during the travel time. In the alternative, if the attorney fee request for travel is not stricken, the Agency requests that the billing entries be reduced by at least 50%. Agency notes that cutting the hourly rate in half for travel time is squarely in line with the law of this Circuit. *See George v. District of Columbia,* Civ. No. 03-1656 (D.D.C., June 8, 2004) slip op. at 12; *see also Cooper v. United States R.R. Ret. Bd.*, 24 F.3d 1414, 1417 (D.C. Cir. 1994).

In retort, Employee cited previous *Spriggs v. District of Columbia Public Schools*, OEA Matter No. 2401-0124-03, p. 3 and 7 (December 6, 2004) (Attached as Exhibit "C"), an OEA case also involving the Agency. At that time Agency likewise argued that travel time was non-compensable. Rejecting the argument, OEA held that the employee was entitled to compensation for the travel time because "employee's counsel was officially operating in service on behalf of the Employee client at all times relative to the attendance at the oral argument...including the 1.4 hours (round trip), claimed for travel time to and from the proceedings." *Id*. at 7. However, the law on the issue is not as settled in the D.C. Circuit as Agency is claiming. Therefore, OEA's established precedent of awarding counsel travel time obviates the need to look to the D.C. Circuit as controlling, regarding the compensability of awarding attorney fees for travel time.[23] (Agency Opp. at 11.)

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[22] At the time this *Initial Decision* was issued, the "current" Laffey Matrix hourly rate had increased to $465.00 per hour. The AJ will award the attorney fee at the then current hourly rate, and will not adjust upwards to the rate which is current on the date of this Order.

[23] In *Miller v. Holzmann,* Judge Lamberth surveyed the history of the travel time issue in the D.C. Circuit, and stated that the circuit has not specifically addressed the issue, although he reduced the travel time compensation by 50%. 575 F.Supp.2d 2, 29 (D.D.C. 2008). *Miller* is not binding on the OEA, but even if it were, *Miller* is distinguishable because of the large amount of U.S.-wide and European travel time incurred in that case.

I find that Employee seeks a mere 1.7 hours for travel time in this case expended on September 6, 2008, and November 26, 2007, for attendance at a scheduling conference and a pre-hearing conference. Counsel's travel time in this case ranged from .70 hours to 1.00 hour, and thus it is reasonable that the time be billed at full rather than reduced rates. I conclude that Agency's argument that the travel time is not reasonable and should be reduced is without merit.

Additional Factual Discussion and Determination

I have evaluated the extensive documents that Employee's counsel submitted in support of his petition for the awarding of a reasonable attorney fee plus costs, and Agency's likewise multiple responses. I find that Employee is the prevailing party and that a reasonable attorney fee and costs should be awarded in the interest of justice. Counsel for the parties has extensively discussed the issue of whether compensation should be awarded at the current *Laffey* Matrix rate ($465.50 per hour, at the time that the fee petition was filed on February 17, 2009), or the historical rate ($425.00 per hour, which was counsel's hourly rate three years ago, when he first became counsel of record). Employee has provided an extensive enumeration of the legal services provided, which need not be reiterated here. Employee's counsel, Attorney Omar Vincent Melehy, an attorney in good standing with the D.C. Bar, has satisfactorily established his experience in handling employment cases of the type now under consideration. I find that applying the *Laffey* Matrix for an attorney's fee award to counsel of his educational and professional experience is appropriate.

After considering Agency's argument that the fee should be awarded at the lower (historical) rate, and Employee's counter argument that courts have widely adopted the current rate of compensation level in awarding of counsel fees, I find that there is good reason to award attorney's fees at the current *Laffey* rate. I note also that some of the responsibility the increase in the amount of Employee's legal service time required was in part attributable to Agency-imposed recalcitrance and unnecessary delays.

The work was done principally by Attorney Melehy (at $465.00 per hour), intermixed with limited input from his staff (at $225.00 per hour for counsel, and $130.00 per hour for law clerks). I am satisfied with counsel's enumeration, which represents the value of legal service time devoted on behalf of Employee.

- Investigations, $724.50
- Case Management, $4135.00
- Procedural Motions, $139.50
- Dispositive Motions and Related Actions, $2,976.00
- Legal Research, $1,592.50
- Drafting OEA Pre-Hearing Briefs to Clarify Legal and Factual Issues, $12,652.50
- Post Remand Discovery, $1,069.50

- Discovery Motions, $1,238.00
- Preparations for Evidentiary Hearing, $5,974.00
- Settlement discussions and efforts, $4,044.00
- Preparing Motion for Attorney's Fees and Costs, $14,680.50
- Seeking enforcement, $8,899.50

Total Attorney Fees Sought at Current Laffey Rates: $58,126.50

Employee's Petition for Attorney Fees is itemized and detailed. However, in reviewing the petition, I determine that in some few instances there amount of time expended on certain items might be slightly excessive. Therefore, I elect to reduce the amount of the attorney fees that will be awarded by five percent (5%), from $58,126.50 (amount sought) to $55, 220.18.

COSTS INCURRED

Employee's costs are set forth in the Revised Affidavit of Costs, in the amount of $1,688.09.

CONCLUSION

For the reasons given, Employee requests that the OEA award her $55,220.18 in attorney's fees plus $1,688.09 in costs. The total amount awarded at this time is $56,908.27

ORDER

The foregoing having been considered, it is,

ORDERED that, within 30 days from the date of this Order, Agency shall pay to Employee the sum of $55,220.18 in attorney fees, plus $1,688.09 in costs, for a total amount due of $56,908.27; and it is

FURTHER ORDERED, that, within 30 days from the date of this Order, Agency shall advise this AJ in writing that the attorney fees and cost reimbursements awarded by this Order, have been paid, and if not, state in detail the specifics of the progress made towards satisfying the obligation.

FOR THE OFFICE:

_____
ROHULAMIN QUANDER, Esq.
Senior Administrative Judge